NO. 41189-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN DAVID MATTHEWS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Bryan Chushcoff

No. 98-1-05430-3

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the court never lost jurisdiction where the Court of Appeals order on the PRP did not dismiss the conviction and only allowed the defendant to withdraw his plea so that the case returned to the same status it had before the entry of the plea?

2. Whether the filing of the Third Amended Information was proper where it was filed prior to opening statements, the defendant was rearraigned and the information only removed some allegations and corrected statutory references?

3. Whether sufficient evidence established the defendant's guilt as to the intent elements in Count I?

4. Whether the court properly applied the aggravators where they were found by the jury and those finding were supported by sufficient evidence?

5. Whether the exceptional sentence imposed by the court was appropriate because it was not clearly excessive nor an abuse of discretion?

6. Whether the court properly allowed Matthews to proceed pro se where the defendant's request was unequivocal timely, and voluntary, knowing and intelligent and where the defendant's claims of confusion, etc. were feigned?

B. STATEMENT OF THE CASE.

1. Procedure

On December 21, 1998, based on an incident that occurred on August 4, 1998, the State charged the defendant, Brian Matthews, with one count of Assault of a Child in the First Degree. CP 247.

On April 19, 1999, the State filed a First Amended Information that added a second count of Assault of a Child in the Second Degree. CP 278-79.

On June 7, 1999, as part of a plea agreement in the midst of trial, the State filed an amended information charging the defendant in Count I, Assault of a Child in the First Degree, Count II, Assault of a Child in the Third Degree. CP 280-82; 283-84. The defendant entered a plea of guilty to the charges, with the agreement that the State could ask for an exceptional sentence of 250 months, and the defendant could ask for the low end of the standard range of 162 months. CP 266-75.[1]

On June 29, 1999, the court filed a letter from the defendant in which he asked to withdraw his plea. CP 285-86. The court ordered the defendant to be evaluated for competency. CP 287-88. On September 3,

[1] Apparently some time after entering the plea, the defendant got access to the judgment and sentence and wrote "VOID" in red pen on the first and last page of the plea form.

1999, the court filed a copy of the forensic psychological examination. CP 289-95. The evaluator was unable to form an opinion about the defendant's competency to enter the plea because Matthews refused to cooperate with the evaluation. CP 294. However, the evaluator noted that, "[h]is behavior in the ward belied his report of severe delusional thinking with paranoid and grandiose themes." CP 294. The evaluator went on to further note that Matthews' claims of delusion were not consistent with his actions on the floor of the ward, and that "he appears somewhat disingenuous and may be exaggerating or embellishing his symptoms for secondary gain." CP 294. In a follow-up evaluation a month later, the evaluator noted that it was not until after his plea on June 7, 1999, that jail mental health records begin to suggest that Matthews was psychotic, but had he truly been psychotic, it is likely the records prior to June 7 would have documented that. CP 296-31; 301. The second evaluator was unable to reach a conclusion with any degree of certainty as to Matthew's competency on June 7, 1999, but that there was evidence to suggest that he may not be completely honest and did note inconsistencies in his conduct between his two stays at Western State Hospital for evaluations, and that he "would now meet the statutory test of legal competency. CP 302.

The court denied the motion to withdraw the plea. CP 311-13.

On October 8, 1999, the court followed the State's recommendation and sentenced the defendant to an exceptional sentence for a total of 250 months. CP 314-24.

On October 13, 1999, the defendant timely filed a notice of appeal. CP 325. A second notice of appeal was filed on November 1, 1999. CP 326. A third notice of appeal was filed on November 5, 1999. CP 327.

On May 15, 2002, the mandate of the Court of Appeals was issued and filed in the superior court. CP 328-39. In the unpublished opinion attached to the mandate, the court rejected Matthews' claims that: medication rendered him incompetent to enter the plea; his offender score was erroneously calculated; current or prior offenses were erroneously not determined to be same criminal conduct; and there was no factual basis to support his plea. CP 328-39. The Court of Appeals affirmed the conviction. CP 328-39.

The defendant filed a personal restraint petition directly in the Court of Appeals under COA# 29359-5-II. In that petition, he claimed that his sentence included prior "washed-out" juvenile offenses, resulting in an incorrect offender score, and that he should be entitled to withdraw his plea of guilt. CP 340-413. The State conceded that the offender score should not have included five juvenile offenses, but opposed the defendant's withdrawal of his plea. CP 340-413. The Court of Appeals transferred the petition to the superior court for a determination on the merits as to whether the erroneous offender score calculation materially

affected Matthews' decision to plead guilty, and thereby entitled him to withdraw his guilty plea. CP 340-413.

The defendant filed a motion to withdraw his guilty plea. CP 414-25. The court denied the motion. CP 441-42. The court re-sentenced the defendant based on an offender score of 4 to an exceptional sentence for a total of 250 months. CP 428-40; 445-48. Matthews signed the Judgment and Sentence with an arrow from his signature to a notation "contesting convictions." CP 428-40. On the stipulation to prior record, Matthews refused to sign, asserting the correct offender score should be three (3), not four (4). CP 426-27. The defendant timely filed a notice of appeal on October 31, 2003. CP 443-44.

While the appeal was pending, the defendant filed in superior court a motion to withdraw pleas of guilty pursuant to CrR 4.2(f). CP 449-62. The court declined to consider the motion because the case was on appeal. CP 463-64.

On August 17, 2005, the Court of Appeals issued a mandate to its opinion in ***In re Matthews***, 128 Wn. App. 267, 115 P.3d 1043 (2005). CP 465-66. In that opinion, the Court affirmed the trial court's denial of the defendant's motion to withdraw his plea, but reversed the exceptional sentence and remanded for resentencing. ***Matthews***, 128 Wn. App. 267.

Prior to resentencing, the defendant was ordered to be examined at Western State Hospital for competency for sentencing. CP 467-70. In a report filed April 20, 2006 the doctor at the hospital concluded that while

Matthews suffered from personality disorder with antisocial and narcissistic features, he was competent. CP 471-80; 478. On May 12, 2006, the court resentenced the defendant to a total of 171 days in custody. CP 481-91.

On February 5, 2008, the Court of Appeals issued an order granting a personal restraint petition on the case. CP 492-93. The order held that the defendant was entitled to withdraw his plea because he entered his guilty plea without understanding the correct standard range. CP 492-93. The order relied upon ***State v. Mendoz***, 157 Wn.2d 582, 141 P.3d 49 (2006), which expressly overruled the Court of Appeals published opinion on the defendant's earlier personal restraint petition. CP 492-93. The certificate of finality issued March 7, 2008. CP 494-95.

On March 21, 2008, the defendant filed a pleading captioned Defendant's Jurisdictional Challenge and Objections Thereto; Demand for ***Franks*** Hearing". CP 496-502. *See* ***Franks v. Delaware***, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). In that pleading he demanded a ***Franks*** hearing in order to present his claim that the deputy prosecuting attorney who originally charged him made false statements in the declaration for determination of probable cause. CP 496-502. The defendant first appeared back before the superior court on April 4, 2008, at which time the court scheduled hearings for bail for the defendant to represent himself, and a ***Franks*** hearing for April 25, 2008. CP 503.

On April 8, 2008, the defendant filed a demand for speedy trial. CP 504.

On April 15, 2008, the defendant filed a motion for dismissal of the charges against him, claiming that when the trial court in 2005 failed to grant his motion to withdraw his plea (which claim was subsequently granted in 2008 when the defendant filed it in the Court of Appeals as a personal restraint petition) he suffered a manifest injustice because, as he claimed, a witness he wished to call had died. CP 505-15. In the motion to dismiss, the defendant states:

> "Had Judge Grant not have [sic] arbitrarily denied Mr. Matthews' motion...or had Judge Grant not have [sic] committed governmental misconduct by failing to allow Mr. Matthews to correct the manifest injustice under the provisions of CrR 4.2(f), Mr. Matthews would have received the same relief which he has only just recently obtained—withdrawal of his involuntary pleas."

CP [p. 7]505-15 (emphasis added).

The defendant's motion to proceed *pro se* was ultimately heard on April 25, 2008, at which point the court entered an order allowing the defendant to proceed *pro se*. CP 518; 516-17.

On May 2, 2008, the court heard the defendant' motions to dismiss; for a ***Franks*** hearing, and for bail reduction. The court denied the motions. CP 519-21.

On May 13, 2008, the State filed an Amended Information that alleged three counts of assault of a child in the first degree and with aggravators. CP 4-6. The court rearraigned the defendant that same day. CP 522-23.

On May 15, 2008, the parties conducted an omnibus hearing, addressed the scheduling of the upcoming trial, confirmed trial readiness, discussed discovery issues and set a discovery deadline. CP 521-25.

On May 22, 2008, the State presented proposed findings and conclusions on the defendant's motion for dismissal, which findings and conclusions the court adopted over the defendant's objection. CP 7-9; 526-27.

On May 23, 2008, the defendant filed a motion to dismiss/set aside the amended information because it included new additional charges beyond those originally filed, and the statute of limitations had run. CP 528-70.

On May 30, 2008, the State filed a Second Amended Information, which amended Count II to Assault of a Child in the Second degree, and did not include a Count III. CP 12-14. The court rearraigned the defendant. CP 10-11.

On June 16, 2008, apparently realizing that he faced a significantly longer sentence if convicted at trial, the defendant filed a motion for specific performance, claiming that he had never actually withdrawn his plea and was entitled to enforce the original plea agreement that the Court of Appeals in [2005] held was unlawfully entered. CP 571-77. On July 14, 2008, the court orally denied the defendant's motion to withdraw his guilty plea. CP 578-79. On July 17, 2008, the court entered a written order that the defendant had in fact withdrawn his guilty plea. CP 15-16. The defendant filed a motion for reconsideration. CP 580-608. On August 7, 2008, the court denied the motion for reconsideration. CP 22; 19-20.

On August 15, 2008, the defendant filed a notice of appeal to the court's order denying the defendant's motion to withdraw his guilty plea, as well as the court's order denying the motion for reconsideration. CP 609-13. That appeal was filed under COA# 38186-9-II. On December 10, 2008, the Court of Appeals issued a ruling, staying the defendant's trial. CP 614-15. On March 1, 2010, the Court of Appeals issued a mandate to its order of January 4, 2010, in which the court dismissed the appeal based upon a motion by the defendant that the court do so. CP 620-21.

On April 22, 2010, the court entered an oral ruling allowing the defendant to represent himself. CP 248-49.

The case proceeded to trial before the honorable Bryan Chushcoff on June 28, 2010. RP 06-29-10, p. 45, ln. 15 to p. 46, ln. 5. The jury was empaneled the next day on June 29, 2010. CP 622.

Immediately after the jury was empaneled and prior to opening statements, the State filed a Third Amended Information that removed an allegation that the crimes were domestic violence incidents; removed an aggravating factor for egregious lack of remorse, and corrected the statutory references to those in effect at the time of the defendant's crime. RP 07-29-10, p. 46, ln. 7 to p. 47, ln. 3. *Compare* CP 12-14 with CP 64-66. It also separated the aggravators into individually enumerated paragraphs where they had previously been listed in the body of the paragraph. CP 64-66.

On July 8, the court dismissed Count II on the defendant's motion, holding that the State failed to meet its burden of proof as to that count. CP 623. On July 9, 2010, the jury returned a verdict of guilty on Count I. CP 140. The jury also entered "yes" to the special verdict questions, thereby finding that the defendant committed the aggravators. CP 142.

On August 13, 2010, the court sentenced the defendant to an exceptional sentence for a total of 540 months. CP 143-55. The defendant filed a timely notice of appeal on September 15, 2010. CP 624-27.[2]

On October 6, 2010, the defendant filed in superior court a motion to vacate the judgment and sentence and dismiss the charges. CP 628-31.

On October 8, 2010, the court filed a corrected judgment and sentence. CP 156-62.

2. Facts

In August of 1998, Tracey Sears lived in Tacoma with her three kids and with her boyfriend, Brian Matthews, the defendant. RP 07-01-10, p. 211, ln. 9-23. At that time she had been in a dating relationship with Matthews since April of 1998. RP 07-01-10, p. 213, ln. 19-25.

Ms. Sears worked as a nurse's aid on a graveyard shift taking care of dementia patients at a place called Jefferson House. RP 07-01-10, p. 216, ln. 3-19. She had a babysitter who watched her children, but the babysitter had spanked one of the children more than once, which Ms. Sears had asked the babysitter not to do, so Ms. Sears stopped using the babysitter. RP 07-01-10, p. 217, ln. 6-11. Instead, Ms. Sears asked Brian

---

[2] The record contains a Declaration of Service By Mail that states that the defendant deposited it in the Unit Officer's station on September 11, 2010. CP [Declaration of Service by Mailing, filed 09-15-10]. If accurate, this is consistent with the requirements of GR 3.1.

Matthews to watch the kids until she could work days or make some other arrangements. RP 07-01-10, p. 217, ln. 11-13. She also had Matthews appointed the State approved and designated babysitter for the kids so he could be paid as part of a program to assist working mothers with child care. RP 07-01-10, p. 215, ln. 2-24. Matthews agreed to do so. RP 07-01-10, p. 217, ln. 14-15. Matthews watched the kids for less than a month before the incident in this case occurred. RP 07-01-10, p. 217, ln. 16-18.

In August of 1998, Tracy Sears daughter, A.E. was 13 months old. RP 07-01-10, p. 217, ln. 21-25. On August 4, 1998, A.E. was close to walking if she wasn't walking. RP 07-01-10, p. 223, ln. 8-11. In the afternoon that day Tracy, along with A.E. and her other children, went to a friend's house in the afternoon and went swimming. RP 07-01-10, p. 221, ln. 13 to p. 222, ln. 23. The returned home so Tracy could make dinner and go to work. RP 07-01-10, p. 223, ln. 18-20. When Tracy left for work that night, A.E. did not have any injuries. RP 07-01-10, p. 228, ln. 9-12.

While Tracy was at work, around 1:00 a.m. she received a phone call from Matthews. RP 07-01-10, p. 228, ln. 18-22. He told Tracy it looked like A.E. had a sunburn. RP 07-01-10, p. 228, ln. 22-24. He said that A.E.'s skin was peeling and that he wanted to peel it up. RP 07-01-10, p. 229, ln. 25 to p. 230, ln. 3. Tracy told Matthews to give A.E. a cool, but not cold bath. RP 07-01-10, p. 229, ln. 2-4. Tracy could hear running water over the phone. RP 07-01-10, p. 231, ln. 10-11. Tracy could hear

A.E. who wasn't crying or screaming, but was making more like an uncomfortable sound. RP 07-01-10, p. 231, ln. 14-16.

Matthews did not indicate that A.E. appeared to need urgent medical care or that she might be in significant pain. RP 07-01-10, p. 232, ln. 2-7.

On August 5, 1998, Tracy Sears arrived home from work before, but right around 7:00. RP 07-01-010, p. 220, ln. 21 to p. 221, ln. 12. Tracy checked on her son, and then looked in on A.E. RP 07-01-10, p. 234, ln. 9-17. As soon as Tracy looked at A.E. she knew A.E. needed to go to the hospital. RP 07-01-10, p. 234, ln. 17-18. Matthews was asleep on the couch in the living room. RP 07-01-10, p. 234, ln. 19-21. Tracy tried to wake Matthews up, but at trial she claimed she could no longer remember if he did wake up. RP 07-01-10, p. 236, ln. 2-9.

Tracy's car was out of gas, so she took Matthews' car. RP 07-01-10, p. 236, ln. 3-5. Tracy took A.E. to Madigan Army Medical Center. RP 07-01-10, p. 245, ln. 2-5. She took A.E. to Madigan because A.E.'s father was in the military. RP 07-01-10, p.245, ln. 6-7. It seemed like it took forever to get to Madigan, but once Tracy got there she took A.E. straight to the emergency room. RP 07-01-10, p. 245, ln. 13-15. It seemed like they were at Madigan forever, and then Madigan transported them to Harborview by ambulance because Harborview has the best burn unit. RP 07-01-10, p. 246, ln. 19-22; p. 247, ln. 22 to p. 248, ln. 3.

At Harborview, A.E. was seen immediately, and Tracy was with A.E. holding her. RP 07-01-10, p.248, ln. 7-8. At some point, Mathews arrived at Harborview. RP 07-01-10, p. 248, ln. 20-23.

At Harborview, A.E. was treated by Dr. Heimbach. RP 07-07-10, p. 586, ln. 4-10; p. 589, ln. 15-17. Dr. Heimbach testified as to three significant recent burns A.E. had. RP 07-07-10, p. 590, ln. 1 to p. 595, ln. 14. He testified that A.E. had severe contact burns caused by a hard flat surface, consistent with an iron found in the residence. RP 07-07-10, p. 590, ln. 1 to p. 595, ln. 14.; 603, ln. 11 to p. 604, ln. 24.

When the case was originally investigated, Sears had attempted to suggest to officers that A.E. got burned by water from an electric tea maker that she pulled onto herself which spilled hot water, and at trial the defense tried to suggest that claim again through Sears' testimony. RP 07-01-10, p. 249, ln 5 to p. 254, ln. 1; p. 328, ln. 9 to p. 330, ln. 16. Additionally, Sears discussed some other injuries to A.E.'s foot and said that Mathews had been working with speaker wire and that she found a piece of the speaker wire punctured into A.E.'s foot. RP 07-01-10, p. 258, ln. 14 to p. 360, ln. 25.

Dr. Heimbach stated that he would state his professional reputation on the fact that A.E. was not burned by a hot liquid such as water from a tea maker as suggested by the defense. RP 07-07-10, p. 595, ln. 5-21. Dr. Heimbach also testified that purported puncture wounds on A.E.'s feet

from the stereo wire were not puncture wounds at all but rather burns. RP 07-07-10, p. 596, ln. 1-13.

Sears also claimed that a shelf in the closet broke and a box of books fell on A.E. causing bruising to her. RP 07-01-10, p. 255, ln. 4 to p. 258, ln. 13. However, Tracy's mother had seen the inside of the closet and indicated that the shelf was intact and there was no sign of tearing in the wall, as there would have been if the rack had pulled out as described. RP 07-01-10, p. 362, ln. 4-23; p. 368, ln .17 to p. 370, ln. 8.

Tracy Sears also violated the trial court's order *in limine* that prohibited references to the fact the defendant had been in prison. RP 07-01-10, p. 264, ln. 20 to p. 265, ln. 25. In ruling on the defendant's resulting motion for a mistrial the court found, "that Ms. Sears more probably than not intentionally violated the order *in limine* in order to assist the defendant and with that purpose in mind." RP 07-01-10, p. 278, ln. 25 to p. 279, ln. 3.

Later Tracy obtained a temporary restraining order against Mathews, prohibiting him from having contact with A.E., however she never obtained a permanent order. RP 07-01-10, p. 334, ln. 12-23; p. 343, ln. 21 to p. 346, ln. 7. At trial, Sears claimed that she didn't recall petitioning the court for the temporary order of protection, and said she didn't think she did get it and that she never got a permanent order, because she didn't ever think that there was a temporary one. RP 07-01-10, p. 344, ln. 1 to p. 346, ln. 7. Sears maintained this despite being

presented with a copy of the petition for the temporary restraining order and acknowledging it was her writing on it. RP 07-01-10, p. 343, ln. 21 to p. 344, ln. 23.

Tracy Sears admitted that she continued to maintain her relationship with Mathews after A.E. went to the hospital. RP 07-01-10, p. 264, ln. 6-11; p. 302, ln. 3-7. In about December of 1998, she even moved into a residence with Matthews that was located on or adjacent to his parents' property. RP 07-01-10, p. 346, ln. 8-13. Tracy claimed that she had no contact with Matthews while he was in prison, until 2008. RP 07-01-10, p. 264, ln. 20-24. However, she did acknowledge that in 2008, while Matthews was still in custody back at the jail, she agreed to marry him, obtained a marriage license and thought she had, although she later concluded it wasn't valid. RP 07-01-10, p. 264, ln. 12-19; p. 302, ln. 8-10; p. 347, ln. 18 to p. 348, ln. 2.

C. ARGUMENT.

1. BECAUSE THE COURT OF APPEALS 2008 ORDER GRANTING THE DEFENDANT'S PRP ONLY RESULTED IN THE WITHDRAWAL OF HIS PLEA, IT WAS NOT NECESSARY TO REARRAIGN HIM FOR THE COURT TO ACQUIRE JURISDICTION.

The defendant's claim on this issue is predicated on the fact that he did not enter a plea in his first appearance in superior court after the ruling by the Court of Appeals. However, the defendant misunderstands the

effect of the Court of Appeals' February 7, 2008, Order Granting Petition. It did not dismiss his case. The judgment and sentence was vacated, but the previously filed charges were not. They remained in effect, so that the court never lost jurisdiction. *See, e.g.*, ***State v. Eaton***, 164 Wn.2d 461, 466-67, 191 P.3d 1270 (2008) (holding that following a mistrial a defendant need not be rearraigned at a subsequent trial and citing ***State v. Whelchel***, 97 Wn. App. 813, 819, 988 P.2d 20 (1999). The Court of Appeals' order merely resulted in the withdrawal of Matthews' plea. That put the case back into the posture it was in prior to the entry of his plea and in no way deprived the court of jurisdiction. Therefore, it was not necessary for the court to rearraign the defendant in order to acquire jurisdiction after remand.

Because the withdrawal of his plea merely returned his case to the status it had before he entered his plea, the re-entry of a plea after remand was unnecessary.

a. The Court Had Subject Matter Jurisdiction Over The Defendant

The trial court's jurisdiction is a question of law which is reviewed *de novo*. ***State v. Carneh***, 149 Wn. App. 402, 409, 203 P.3d 1073 (2009). The superior court has jurisdiction in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law.

RCW 2.08.010. *See also* ***State v. Werner***, 129 Wn.2d 485, 493, 918 P.2d 916 (1996) (*citing* Wash. Const. art. IV, § 6; and RCW 2.08.010). The court acquires jurisdiction with the filing of an information. ***Carneh***, 149 Wn. App. 402, 409-10, 203 P.3d 1073 (2009).

Here, Matthews was charged with the felony crime of Assault of a Child in the First Degree on December 21, 1998. CP 1. On April 19, 1999, the State filed a First Amended Information that added a second count of Assault of a Child in the Second Degree. CP 278-79.

On June 7, 1999, as part of a plea agreement in the midst of trial, the State filed an amended information charging the defendant in Count I, Assault of a Child in the First Degree, Count II, Assault of a Child in the Third Degree. CP 283-84; 280-82. The defendant entered a plea of guilty to those charges. CP 266-75.

His plea having been withdrawn to the amended information, the case reverted back to the First Amended Information that was filed in April 19, 1999. As indicated, that information charged Matthews with Assault of a child in the first degree, Count I; and Assault of a Child in the Second Degree, both felonies alleged to have been committed in Pierce County, Washington. CP 278-79.

As a result, the court had subject matter jurisdiction over the case from the time of the defendant's first appearance in court after the remand from the Court of Appeals.

b. The Court Had Personal Jurisdiction Over The Defendant

The State has personal jurisdiction over all individuals who commit crimes in this State. ***State v. Golden***, 112 Wn. App. 68, 74, 47 P.3d 587 (2002) (citing RCW 9A.04.030(1)); ***Werner***, 129 Wn.2d at 493-94. The defendant's crime was alleged to have occurred in the State of Washington and Matthews was located in Washington when he committed the crime. *See* CP 64-66. Accordingly, the court had personal jurisdiction over Matthews. The State acquired that jurisdiction with the filing of the information in 1998 and never lost it.

c. The Court Did Not Violate The Time For Trial Rule: CrR 3.3.

Mistakenly believing that the State did not acquire jurisdiction until the filing of an amended information on June 29, 2010, the defendant claims that the time for trial expired where he was in-custody from the time of his first appearance in court on April 4, 2008. CP 503. He believes the time for trial expired because the court lacked jurisdiction during that period, so that all of the court's orders (including those continuing the trial date) were void *ab initio.* Br. App. 8.

Matthew's argument fails for several reasons. The Supreme Court amended the time for trial rule in 2003, so that most of the case law upon which he relies pertains to an earlier version of the rule that is no longer applicable. *See* ***State v. Olmos***, 129 Wn. App. 750, 756-57, 120 P.3d 139

(2005). Moreover, the modified criminal rule applied to pending cases on its effective date. ***Olmos***, 129 Wn. App. at 756-57.

Under the 2008 version of the rule in effect when Matthews first returned to superior court on April 4, 2008, the initial commencement date was the date of the original arraignment (in 1997). CrR 3.3(c)(1). However, the commencement date was reset to the date the defendant first appeared in court after appellate review or stay. CrR 3.3(c)(2)(iv).

Thus, Matthews time for trial commenced on April 4, 2008, when the defendant's abandonment of his appeal became final. Because where the earlier information remained in effect, the court did not lack jurisdiction and its orders continuing trial were not void. Accordingly, Matthews' claim fails.

The withdrawal of Matthews' plea did not divest the court of jurisdiction, nor was a rearraignment required where the withdrawal merely returned to effect the information that had last been filed before the entry of his plea. Accordingly, the court lacked neither subject matter nor personal jurisdiction. Its orders were therefore not void with the effect that Matthews' time for trial was not violated. Because this claim is without merit, it should be denied.

2. THE FILING OF THE THIRD AMENDED INFORMATION DID NOT VIOLATE THE DEFENDANT'S SUBSTANTIAL RIGHTS WHERE IT MERELY DISMISSED A DOMESTIC VIOLENCE ALLEGATION AND ONE AGGRAVATOR, AND CORRECTED STATUTORY REFERENCES

Under CrR 2.1(d), the State has discretion to amend the charging document at any time before verdict or finding as long as the substantial rights of the defendant are not prejudiced. ***State v. Emery***, 161 Wn. App. 172, 253 P.3d 413, 429 (2011). The amendment of an information is a matter addressed to the sound discretion of the trial court. ***State v. Collins***, 45 Wn. App. 541, 551, 726 P.2d 491 (1986). In order to claim error from the amendment, a defendant must show prejudice therefrom. ***Collins***, 45 W. App. at 551.

Typically, the remedy for a defendant who is misled or surprised by an amendment is to move for a continuance so as to be able to prepare the requisite defense. ***Collins***, 45 Wn. App. at 551. However, where a defendant fails to show the trial court that allowing a continuance would materially add to or alter the defense, the court's denial of a request for a continuance is not an abuse of discretion. ***Collins***, 45 Wn. App. at 551.

Here, the Third Amended information was filed on June 29, 2010. CP 64-66. This happened shortly after the jury was empaneled and prior

to opening arguments. RP 06-29-10, p. 46, ln. 1 to p. 49, ln. 18. CP 212. The defendant did ask for a continuance, but the court denied that request. RP 06-29-10, p. 47, ln. 12 to p. 49, ln. 18; p. 53, ln. 14 to p. 54, ln. 21.

The defendant relies upon ***State v. Woods*** for the proposition that a substantial amendment to an information requires that the accused be arraigned on the amended information. ***State v. Woods***, 143 Wn.2d 561, 623, 23 P.3d 1046 (2001). ***Woods*** cites to ***State v. Hurd***, 5 Wn.2d 308, 312, 105 P.2d 59 (1940); and CrR 2.1(d). CrR 2.1(d) (2001) merely indicates that an information may be amended if substantial rights of the defendant are not prejudiced. It does not require re-arraignment. Similarly, ***Hurd*** cites to the very old case ***State v. Van Cleve***, 5 Wash. 642, 62 P. 461 (1893).

However, the opinion in ***Van Cleve*** relies upon code of procedure in effect at that time. ***Van Cleve***, 5 Wn. 643 (citing Code Proc. §§ 1231, 1269, 1271). No current provision could be found that has such a requirement. Thus, contrary to the statement in ***Wood***, rearraignment is not required after an amended information is filed. What is required is adequate notice (because it becomes an issue of due process). *See, e.g.* ***State v. Theroff***, 25 Wn. App. 590, 596, 608 P.2d 1254 (1980); ***State v. Eaton***, 164, Wn.2d 461, 466-67, 191 P.2d 1270 (2008).

In any case, here the defendant was in fact rearraigned on June 29, 2010. RP 06-29-10, p. 49, ln. 17 to p. 53, ln. 17. What the defendant did not do was change his earlier plea of "not guilty." However, under CrR

4.1 it is not required that the defendant enter a plea at arraignment. All the rule requires is that a copy of the information be read to the defendant. *See* CrR 4.1(d). As indicated above, that was done. Moreover, it should be noted that the defendant did not indicate a desire to change his plea. Per CrR 4.2, there are only three types of pleas, "not guilty," "not guilty by reason of insanity," and "guilty." In those instances where defendants refuse to enter any plea at all, the court routinely enters a plea of "not guilty" on their behalf, since the court cannot constitutionally take either of the other two actions without the defendant's agreement.

Indeed, here, when Matthews brought to the court's attention the issue of the lack of the entry of a plea to the third amended information, the court asked if he wished to enter a plea and he refused to do so, with the result that the court entered a plea of "not guilty" over the defendant's objection. RP 07-07-10, p. 678, ln. 5 to p. 680, ln. 8. Where the court ultimately entered a plea of "not guilty" on the defendant's behalf, he can also show no prejudice.

The court's possession of such authority is an inherent necessity. If the defendant's argument had merit, any defendant would be able to either prevent the amendment of any information, or else stop the conduct of further proceedings simply by refusing to enter any plea to an amended information.

The defendant can show no prejudice for another reason. The only substantive change effected by the Third Amended Information was that it

removed an allegation that the crimes were domestic violence incidents; removed an aggravating factor for egregious lack of remorse, and corrected the statutory references to those in effect at the time of the defendant's crime. RP 07-29-10, p. 46, ln. 7 to p. 47, ln. 3. *Compare* CP Second Amended Information, filed 05-30-08] with CP 64-66. There was an another non-substantive change that it separated the aggravators into individually enumerated paragraphs where they had previously been listed in the body of the paragraph. CP 64-66.

Since the third amended information only took away aspects of the charges and added nothing, the defendant's earlier plea of "not guilty" remained in effect as to everything alleged in the third amended information.

The defendant claimed he was absolutely unprepared for the amended information and asked for a continuance. RP 06-29-10, p. 47, ln. 12-19. The court was unable to discern a change of any consequence to the presentation of the defense. RP 06-29-10, p. 47, ln. 20 to p. 48, ln. 4. In response, the defendant could only assert, "I'm just unprepared for it." RP 06-29-10, p. 48, ln. 5. Despite further questioning from the court, the defendant could not articulate any reason why the defense needed a continuance, even after taking a recess to allow the defendant to consult with standby counsel. RP 06-29-10, p. 48, ln. 6 to p. 49, ln. 13.

The court found that there would not be any prejudice to the defendant and granted the motion to amend. RP 06-29-10, p. 49, 14-18.

The defendant's claim is flawed for another reason as well. The defendant claims that the third amended information was not filed until after the close of the State's case. Br. App. 12ff. However, that claim is factually incorrect as it was filed immediately after jury selection and prior to opening. RP 06-29-10, p. 46, ln. 1 to p. 49, ln. 18. The defendant also claims that he was not rearraigned until after the close of the State's case. Br. App. 14.

The defendant's claim appears to be that he did not formally enter a plea to the State's amended information until July 7, 2010.

The court did not fail to rearraign the defendant where the Third Amended Information was filed on June 29, 2010, and that same day the court gave the defendant a formal reading of it. RP 06-29-10, p. 46, ln. 7 to p. 53, ln. 17; CP 64-66. Accordingly, the court did not err. Even if the failure to enter a plea at that time were error, it was harmless and did not prejudice the defendant.

The court never lost jurisdiction where the defendant's conviction never dismissed, and all the court's orders were legally effective. A new time for trial commencement date began to run from the defendant's first appearance in court after the appeal. The court did rearraign the defendant after the filing of the third amended information. Nor was the court's entry of a plea of not guilty on the defendant's behalf improper where the defendant refused to enter a plea. Further, even if it was error, any error was harmless where there was no prejudice to the defendant from the

amendment. For these reasons, the defendant's claim on this issue should be denied as without merit.

3. SUFFICIENT EVIDENCE ESTABLISHED THE DEFENDANT'S GUILT

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> [...]great deference [. . .] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Here, the defendant was charged and found guilty in Count I with Assault of a Child in the First Degree. CP 64-66; 140. As instructed, the elements of that count are that:

1) On or about August 4, 1998, the defendant

a) committed the crime of assault in the first degree against A.E.; or

b) intentionally assaulted A.E. and recklessly inflicted great bodily harm;

2) the defendant was eighteen years of age or older and A.E. was under the age of thirteen; and

3) the act in element I occurred in the State of Washington. RCW 9A.36.120; CP 125.

As instructed as to element (1)(a), a person commits assault in the first degree when, with intent to inflict great bodily harm, he assaults another and inflicts great bodily harm. RCW 9A.36.011; CP 120. Thus, under either alternative in the first element the State was required to prove that the defendant acted intentionally. The defendant claims that the State failed to put forth sufficient evidence of intent. Br. App. 18.

The jury could infer that the defendant's actions were intentional. A.E. received three separate flat surface contact burns on her body that were consistent with an iron having been applied to her. RP 07-07-10, p. 587, ln. 2-10; p. 589, ln. 22 to p. 594, ln. 24. One of those burns was centered on her face. RP 07-07-10, p. 587, ln. 4-6; Ex. 8-9, 33-34. From

these facts alone the jury could infer that the burns were intentional because A.E. was burned in three separate places on her body so that each burn had to occur separately. This is inconsistent with an accidental burn and consistent with the intentional application of the iron to A.E.

When all the facts and inferences are construed in favor of the State, the jury could find that the defendant acted intentionally as to either alternative under the first element. Accordingly, the defendant's claim on this issue is without merit and should be denied.

4. THE COURT PROPERLY IMPOSED THE AGGRAVATORS WHERE THEY WERE FOUND BY THE JURY AND SUFFICIENT EVIDENCE SUPPORTED THE JURY'S FINDINGS.

Case law regarding a sufficiency of the evidence analysis is detailed in section 3 above. Under the Sentencing Reform Act, aggravators are defined and their application is governed by RCW 9.94A.535.

Here, the jury was instructed as to three aggravators and did find that they exist. CP 132; 142. The three aggravators that the jury found were that:

1) the defendant used his position of trust or confidence to facilitate the commission of the crime;

2) the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance; and

3) the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim.

CP 132; 142. These are all aggravators that are authorized under the SRA. RCW 9.94A.535(3)(a), (b), (n). Further, sufficient evidence supported the aggravators.

a. Sufficient Evidence Supported The Finding That Matthews Used His Position of Trust or Confidence to Facilitate the Crime.

The first aggravator was that Matthews used his position of trust or confidence to facilitate the crime. CP 132; 142. Matthews was A.E.'s babysitter while her mother was at work. RP 07-01-10, p. 215, ln. 2-24; p. 217, ln. 8-18; p. 220, ln. 23-25; Matthews was the sole caretaker of A.E. during that time. RP 07-01-10, p. 224, ln. 4-5; p. 246, ln. 1-5. At the same time he was also the babysitter of A.E.'s brother, J.S. RP 07-01-10, p. 227, ln. 13 to p. 228, ln. 2. Moreover, Matthews was the babysitter Sears had specifically asked to have approved by the State as part of a working mothers program she participated in. RP 07-01-10, p. 215, ln. 4-24; p. 217, ln. 8-18. As such, Matthews was responsible for A.E.'s health and safety. *See also* RP 07-01-10, p. 218, ln. 17-20; p. 220, ln. 3-17.

Not only was Matthews A.E.'s babysitter, he was also in a dating relationship with Sears, and lived at the residence with A.E., Sears and J.S. RP 07-01-10, p. 211, ln. 9-23; p. 212, ln. 19 to p. 214, ln. 17. That also

put him in a position of trust. *See* ***State v. Bedker***, 74 Wn. App. 87, 95, 871 P.2d 673 (1994).

Tracy Sears testified that A.E. was fine when she left to go to work. She also testified that Matthews called her at work during the middle of her shift and claimed that A.E. appeared to be sunburned. RP 07-01-10, p. 228, ln. 21 to p. 229, ln. 4; p. 229, ln. 25 to p. 230, ln. 5.

From these facts, the jury could find that Matthews had a position of trust, and that he used that position to facilitate the crime. The jury could infer the position of trust from Matthews's status as the state approved babysitter, as well as his status as Sears' boyfriend who resided with the children. They jury could also find that Matthews used his position of trust to facilitate the crime by inferring that it occurred after Tracy Sears had gone to work, but before he called her about the apparent "sunburn." This is particularly so where A.E. had contact burns on three different parts of her body from a hot flat surface consistent with an iron. RP 07-07-10, p. 587, ln. 4-7; p. 590, ln. 4-6; p. 592, ln. 22 to p. 593, ln. 8. The multiple burn sites are consistent with Matthews intentionally burning A.E. repeatedly. That supports a further inference from the jury that he used his position of trust or confidence to inflict harm on A.E. when Tracy Sears was away.

b. Sufficient Evidence Supported the Finding that Matthews Knew or Should Have Known that the Victim was Particularly Vulnerable or Incapable of Resistance.

The second aggravator was that Matthews knew or should have known that the victim was particularly vulnerable or incapable of resistance. A.E. was thirteen months old at the time and just learning to walk. RP 07-01-10, p. 217, ln. 23-25; p. 223, ln. 8-11. There was also evidence of bruising and scraping on her arms consistent with being held tightly. RP 07-07-10, p. 587, ln. 7-10; p. 597, ln. 23 to p. 598, ln. 25. A.E. had no meaningful way to get away from Matthews. A.E. didn't have the ability to seek help. She was completely dependent on adults for her health and safety. From this the jury could find that Matthews knew or should have known that A.E. was particularly vulnerable or incapable of resistance. *See* RP 07-01-10, p. 217, ln. 23 to p. 218, ln. 16. Indeed, the court has previously held that the fact that a victim was four to five years old was sufficient to establish the aggravator of vulnerability. ***Bedker,*** 74 Wn. App. at 94.

The fact that A.E. was only thirteen months old speaks for itself as to this aggravator.

c. Sufficient Evidence Supported the Finding that the defendant's conduct manifested deliberate cruelty to the victim.

The third aggravator was that the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim. Mathews gave A.E. a severe contact burn with a flat surface consistent with an iron. RP 07-07-10, p. 593, ln. 2 to p. 594, ln. 4. A.E. received not one, but three such burns on different parts of her body. RP 07-07-10, p. 593, ln. 4-6; p. 589, ln. 22 to p. 595, ln. 14. This mean Matthews continued to inflict additional injuries on A.E. after the first burn. Moreover, one of those burns was centered directly on her face, causing a severe burn with permanent scarring to her chin, lips, cheeks, tip of the nose, and bridge of the nose. *See* Ex. 8-9; 33-34. There was sufficient evidence to support the jury's finding that Matthews manifested deliberate cruelty to A.E.

The defendant also claims that the jury should have believed A.E.'s older brother, J.S. who was eleven at the time. Br. App. 19ff However, questions of credibility are for the jury to decide. ***Cord***, 103 Wn.2d at 367. Here, J.S.'s grandmother testified that while A.E. was still in the hospital, J.S. spent the night with Matthews, and that before he did so he could recall details about the incident, but that after he spent the night with Matthews he no longer could. RP 07-01-10, p. 364, ln. 2 to p.

366, ln. 20. The court could have found that J.S. was subject to manipulation by Matthews and his testimony that sought to exonerate Matthews was not credible.

Matthews similarly attempts to rely on the testimony of A.E.'s mother Tracy Sears to support a suggestion that A.E. burnt herself on a tea maker. Br. App. 20ff. However, there was evidence that Tracy Sears continued her relationship with Matthews well after the incident occurred. RP 07-01-10, p. 263, ln. 22 to p. 264, ln. 11; p. 302, ln. 3-16. While she claimed she did not have contact with Matthews once he went to prison, she acknowledged that she attempted to marry him in 2008 and at least for a time thought she had. RP 07-01-10, p. 264, ln. 12-24; p. 302, ln. 8-10; p. 310, ln. 6-9; p. 347, ln. 18 to p. 348, ln. 2. For all these reasons, the jury could find that Tracy Sears was not credible to the extent that her testimony attempted to exonerate Matthews. Further, the jury could have just decided her testimony wasn't relevant where Tracy Sears was away at work when the incident happened.

Finally, the suggestion by J.S. and Tracy Sears that A.E. burnt herself on hot water from the tea maker was contradicted by Dr. Heimbach, who was willing to stake his professional reputation on the fact that A.E. suffered from a contact burn with a hot flat surface and not a scald burn from a liquid. RP 07-07-10, p. 594, ln. 1-25; p. 603, ln. 11 to p. 604, ln. 6.

Because sufficient evidence supported each of the aggravators, the defendant's claim is without merit and should be denied.

5. THE EXCEPTIONAL SENTENCE IMPOSED BY THE COURT WAS NOT AN ABUSE OF DISCRETION

A claim that a defendant's exceptional sentence was clearly excessive is reviewed for abuse of discretion. ***State v. Alvarado***, 164 Wn.2d 556, 560-61, 192 p.3d 345 (2008) (citing ***State v. Law***, 154 Wn.2d 85, 92, 110 P.3d 717 (2005) (citing RCW 9.94A.585)).

The defendant also relies upon RCW 9.94A.585(4)(b) which states that a sentence outside the standard range may only be reversed on appeal if it is clearly excessive or too lenient. *See* Br. App. 31. The reviewing court may not reverse a sentence as clearly excessive under RCW 9.94A.585(4)(b) unless the trial court abused its discretion. ***State v. Ritchie***, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). While the statute does not define "clearly excessive", the courts have held that it means the action:

> ... "goes beyond the usual, reasonable, or lawful limit." Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable ground or for untenable reasons, or an action that no reasonable person would have taken.

Ritchie, 126 Wn.2d at 393 (quoting ***State v. Oxborrow***, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986) (quoting ***State v. Strong***, 23 Wn. App.

789, 794, 599 P2d 20 (1979))). That definition remains current. ***State v. Sao***, 156 Wn. App. 67, 80, 230 P.3d 277 (2010).

Sentences that are double or quadruple the standard range have been held not to be clearly excessive. ***State v. Souther***, 100 Wn. App. 701, 998 P.2d 350 (2000) (holding sentence four times standard range was not clearly excessive); ***State v. Sanchez***, 69 Wn. App. 195, 848 P.2d 735 (1993) (holding that sentence that exceeded twice the presumptive range was not clearly excessive); on the other hand, a sentence has been held to be clearly excessive where the aggravating factors were not so unusually compelling to justify a sentence approximately six times the standard range. ***State v. Delarosa-Flores***, 59 Wn. App. 514, 799 P.2d 736 (1990).

The defendant claims that court did not base its exceptional sentence on the aggravators found by the jury. Br. App. 28. The jury was instructed as to three aggravators and did find that they exist. CP 132; 142. The three aggravators that the jury found were that:

> 1) the defendant used his position of trust or confidence to facilitate the commission of the crime;
>
> 2) the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance; and
>
> 3) the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim.

CP 132; 142.

The court entered findings and conclusions regarding the exceptional sentence. The court's findings and conclusions are limited to identifying the aggravators found by the jury, whether there was sufficient evidence to support the jury's findings, and the court's determination that the appropriate sentence for the defendant is 540 months. CP 226-30. In arriving at the 540 month number the court found:[3]

> The appropriate length sentence the defendant should receive is 540 months in prison. In imposing that sentence, the court has considered the defendant's age, the victim's age, the amount and nature of his criminal history, the standard range sentences available to the court, the defendant's position of trust, including the length and nature of the relationship between the defendant and the victim and the defendant and Tracy Sears, the victim's particular vulnerability, including her extreme youth and general helplessness, and the defendant's deliberate cruelty, including the gratuitous violence of the assault which inflicted physical, psychological and emotional pain upon A.E. as an end in itself, and the evidence presented by the defense in mitigation at sentencing.

CP 229 [Concl. IV]. The record strongly establishes that the court imposed an exceptional sentence based upon the aggravators found by the jury.

---

[3] A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. ***Rickert v. Pub.Disclosure Comm'n***, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing ***State v. Luther***, 157 Wn.2d 63, 78, 134 P.3d 205 (2006). *See*, ***Hoke v. Stevens-Norton, Inc***, 60 Wn.2d 775, 778, 375 P.2d 743 (1962).

Ignoring the court's reliance on the three aggravators found by the jury, the defendant attempts to rely on a statement by the court at sentencing to support his claim that the court relied on other facts to impose the exceptional sentence. In pronouncing the defendant's sentence, the court gave a very particular and detailed explanation as to the why such a lengthy exceptional sentence was warranted, especially in comparison to other charges, such as murder, etc. It is too long to transcribe here, but this court should review that statement in its entirety when considering this issue. *See* RP 07-09-10, p. 853, ln. 8 to p. 859, ln. 25. At the conclusion of that statement, the court stated the following:

> I do think Mr. Matthews is completely dangerous to everybody because there is nothing – there is no limit to what he will do in his own self-interest. That makes him a very dangerous person. Once more, he has a clearly corrupt moral character, which means whatever he wants to do often is something that is illegal and dangerous to the rest of us.
>
> I thought about this carefully, and I thought carefully about what the State has asked for in terms of a 50-year sentence here. I've thought about it in terms of whether or not this is a [sic] equivalent of murder conviction, or something like that, which is the same kind of thing that he got the first time. Certainly, for this young lady, there was – we knew from the beginning that she was going to be scared [sic] forever, emotionally as well as physically.
>
> ...
>
> I do think it is important that the sentence not be seen to be the product of passion. I have said some harsh things about Mr. Matthews. I don't say them because I'm emotionally engaged in this on some level that is inappropriate. I say it because I think it is absolutely

> factual and that's what the problem is with Mr. Matthews and that's why he is so dangerous.

RP 07-09-10, p. 858, ln. 14 to p. 859, ln. 25.

The jury's finding of the three aggravators is what justifies the imposition of an exceptional sentence. The court relied on those findings in imposing the exceptional sentence. However, having decided to impose an exceptional sentence, the question remained as to what sentence the court should impose from the high end of the standard range up to the statutory maximum. In determining that, the court was entitled to rely upon the totality of the facts before it, and especially in considering whether the sentence would be clearly excessive in light of other serious charges such as murder. It was not improper for the court to consider everything before it when it determined that Matthews deserved a 540 month sentence. *See* ***State v. Mail***, 65 Wn. App. 295, 298-99, 828 P.2d 70 (1992) (stating "If an exceptional sentence is an option, the available sentence length choices and, thus the limits of permissible judicial discretion are expanded.").

Nor was the defendant's sentence excessive. The standard range for the defendant on Count I was 129-171 months. The court's exceptional sentence was for a period of 540 months. That is only 3.2 times greater than the high end of the standard range. Consistent with the case law listed above, in general such a sentence is not clearly excessive.

That is especially so where, as here, the jury found three separate aggravators.

Moreover, all three aggravators are among the more serious of aggravators. This is particularly so of the second and third aggravators (that the victim was particularly vulnerable and incapable of resistance, and that the commission of the crime manifested deliberate cruelty toward the victim), which warrant a more severe sentence. The aggravators the jury found here can be contrasted to a more run of the mill aggravators, such that the defendant's prior unscored history results in a sentence that is too lenient; the defendant's high offender score causes a second crime to go effectively unpunished; the crime was committed shortly after release from incarceration. *See* RCW 9.94A.535(3)(b), (c), (t).

Indeed, the court was particularly lenient toward the defendant insofar as the aggravators at issue, as well as the nature of the crime itself, would certainly warrant the imposition of a far longer sentence, possibly even up to the maximum possibility of life in prison. Indeed, in imposing the exceptional sentence it did, the court rejected the State's request for a 50-year (600 month) sentence. RP 07-09-10, p. 848, ln. 2-14.

The court entered findings and conclusions in support of the exceptional sentence. Those findings are focused on and support the three aggravators found by the jury. CP 226-228. The Court's conclusions were also focused on the three aggravators found by the jury, and whether

sufficient evidence supported them. CP 228-230. The court's imposition of the 540 month exceptional sentence was not clearly excessive.

6. THE TRIAL COURT PROPERLY ALLOWED MATTHEWS TO EXERCISE HIS RIGHT TO PROCEED *PRO SE* WHERE MATTHEWS WAS MENTALLY COMPETENT.

Defendants have an implicit right to self representation under the Sixth Amendment to the United States Constitution, and an explicit right to self-representation via the "...right to appear and defend in person" under the Washington Constitution art. I, § 22. ***State v. Madsen***, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). However, while defendant's have the right to proceed *pro se*, doing so constitutes a waiver of the defendant's constitutional right to counsel. ***Madsen***, 168 Wn.2d at 504. Accordingly, a defendant's right to proceed *pro se* is neither absolute, nor self-executing. ***Madsen***, 168 Wn.2d at 504.

Because a decision to proceed *pro se* constitutes a waiver of the defendant's right to counsel, trial courts are required to indulge in "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." ***Madsen***, 168 Wn.2d at 504 (quoting ***In re Det. of Turay***, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting ***Brewer v. Williams***, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1977)). Thus, the consideration of a defendant's request to proceed *pro se* involves two

(discussing the trend in the Sixth Circuit for having two different standards of review for the counsel waiver issue and noting that the Ninth, Tenth, and Eleventh Circuits all apply a *de novo* standard of review); ***Maine v. Watson***, 900 A.2d 702, 712-13 (Me. 2006) (while noting that North Dakota, Michigan, Iowa, and Colorado apply a *de novo* standard of review, the court concluded that Maine courts should apply a bifurcated standard of review for counsel waiver, reviewing any express or implicit factual findings for clear error, and the legal conclusions de novo). For a more thorough discussion of the issues involved in an abuse of discretion as opposed to *de novo* standard of review, at least under federal law, *see* ***Fields v. Murray***, 49 F.3d 1024 (9th Cir. 1995).

However, as indicated, in Washington a trial court's decision to allow a defendant to proceed *pro se* is reviewed for abuse of discretion. This apparent discrepancy between Washington and Federal standards of review is actually probably not of any great legal consequence. A trial court abuses its discretion if its decision is manifestly unreasonable because it either rests on facts that are unsupported by the record, or it was reached because the court applied the wrong legal standard. ***Madsen***, 168 Wn.2d at 504.

Washington's adoption of the abuse of discretion standard is more refined and the better choice insofar as Washington's abuse of discretion standard implicitly incorporates within it a *de novo* standard of review as to the trial court's application of the law, but still preserves discretion to the trial court's findings so long as they are supported by substantial evidence. Indeed at least one case has held that under the facts of that case the outcome is the same under either standard. *See* ***Nordstrom***, 89 Wn. App. at 741.

Moreover, the abuse of discretion standard is consistent with what in many cases is the closely related standard of review regarding the competency of a defendant to proceed to trial. A trial court's competency decision is reviewed for a manifest abuse of discretion. ***State v. Hicks***, 41 Wn. App. 303, 306, 704 P.2d 1206 (1985) (citing ***State v. Crenshaw***, 27 Wn. App. 326, 330, 617 P.2d 1041 (1980), *aff'd*, 98 Wn.2d 789, 659 P.2d 488 (1983)). "The trial court's decision is entitled to deference because only the trial judge has had the opportunity to observe the person's behavior and demeanor." ***State v. Swain***, 93 Wn. App. 1, 968 P.2d 412 (1998).

Here, Matthews claims that the trial court should not have allowed him to proceed *pro se* because his request was not unequivocal and also because he was not competent. Br. App. 33. A detailed and unfortunately

lengthy review of the trial record is necessary to consideration of this issue.

On April 25, 2008, the court entered an order allowing Matthews to proceed *pro se*. CP 518. The transcript of this proceeding was not designated as part of the record. Accordingly, it is not before the Court on this appeal. In any case, Matthews' challenge does not relate to it. Over the course of the next approximately nineteen months, a number of other proceedings (including an appeal) occurred that are not at issue here.

On January 29, 2010, the defendant appeared before the Honorable Judge Bryan Chushcoff to address several matters, including Matthews' desire to have standby counsel permanently excused from the case. RP 01-29-10, p. 4, ln. 3-11; p. 8, ln. 24 to p. 9, ln. 1. When the court addressed the defendant, nearly all of his responses to the court's questions amounted to stating that he wasn't sure, or that he didn't recall. *See* RP 01-29-10, p. 9, ln. 2-24; p. 13, ln. 6 to p. 14, ln. 7.

As a result, the court found the defendant's request to exclude standby counsel to be equivocal and therefore denied the request. RP 01-29-10, p. 3-10.

For the remainder of the proceeding Matthews did not respond to the court. RP 01-29-10, p. 14, ln. 24 to p. 15, ln. 5; p. 16, ln. 23 to p. 17, ln. 5. As a result, the court directed standby counsel to look into the issue

of whether a defendant may not be competent to represent himself even if he is competent to stand trial. RP 01-29-10, p. 17, ln. 5-15. The court went on to note that if Matthews wasn't responding at all it seemed to the court that he couldn't be effective representing himself. RP 01-29-10, p. 17, ln. 16-18.

The court notified Matthews that if he was going to represent himself he at least had to sign the document. RP 01-29-10, p. 19, ln. 23-25. Matthews wrote "under duress" on the schedule order entered that day that set an omnibus hearing for February 12, 2010. RP 01-29-10, p. 20, ln. 1-6; CP 616.

On February 12, 2010, the court held the omnibus hearing. At that hearing the court asked him if he wanted to represent himself and whether he thought he was able to represent himself, to which he answered that he did and he thought he had the capabilities to do so. RP 02-12-10, p. 5, ln. 20 to p. 6, ln. 2. When asked if he recalled the prior hearing, he said he did vaguely, but that he somewhat had a problem remembering it, that he hadn't been feeling himself lately, but that he was all right. RP 02-12-10, p. 6, ln. 3-10.

After speaking with standby counsel on the court's authority to revoke a defendant's *pro se* status, the court stated that he looked like he was able to respond appropriately if he continued to represent himself, but

that the court wasn't going to excuse standby counsel because the defendant's status could change insofar as his ability to adequately represent himself has fluctuated in the past. RP 02-12-10, p. 8, ln. 13-22.

Matthews again asked that standby counsel be excused or removed from his case as he did not believe that he would need standby counsel's services, that he needed to defend the case by himself and that he was prepared to stand alone. RP 02-12-10, p. 9, ln. 7 to p. 11, ln. 2.

The State opposed the removal of standby counsel, claiming that Matthews had been highly manipulative throughout the proceedings and that by seeking the removal of standby counsel he was attempting to set up an appellate issue whereby he could later claim that he was not competent, because there would be no one to step in and take over his representation once trial had begun [if he were to feign incompetence]. RP 11, ln. 4-25. The court reaffirmed that it was keeping standby counsel on the case and rejected Matthews' follow-up request to have standby counsel removed. RP 02-12-10, p. 12, ln. 23-25.

The court still had to enter an omnibus order at the hearing. Matthews signed the order, but above the signature line Matthews wrote "defendant under duress." and elsewhere added "accepted for value." RP 02-12-10, p. 17, ln. 17-23; CP 617-19. Mathews also refused to

acknowledge that the State had extended him an offer. RP 02-12-10, p. 17, ln. 24 to p. 18, ln. 2.

For purposes of the omnibus order, the court asked Matthews what the nature of the defense was. RP 02-12-10, p. 18, ln. 17-18. Matthews responded that he thought he should reserve anything until the meeting next week.[4] RP 02-12-10, p. 18, ln. 19-21. The court explained that one of the things the defense has to provide at an omnibus hearing is an indication of the general nature of what the defense is. RP 02-12-10, p. 19, ln. 1-3. Matthews explained that he was unsure because he was a little bit not sure and a little bit didn't want to answer the court's question. RP 02-12-10, p. 19, ln. 4-8.

The court then explained that he was not going to allow Matthews to be his own lawyer simply to refuse to take action on the case that any lawyer would have to take action on, and that Matthews couldn't get special status. RP 02-12-10, p. 19, ln. 9-20. Matthews then said he understood that and that for the purposes of filling out the form his defense would be general denial. RP 02-12-10, p. 19, ln. 13-22.

---

[4] This appears to be a reference to the previously scheduled trial date of 02-23-10. *See* CP [Scheduling Order, filed 01-29-10].

Matthews signed the omnibus order, "under duress" RP 02-12-10, p. 20, ln. 17-21; CP 617-19. After stating that he did not agree and that he did not wish to dishonor the case, Matthews stated that he did not agree to consent or assent to any manifestation, which would stipulate to anything, except receiving this matter. RP 02-12-10, p. 21, ln. 19-24. These actions left the court concerned that while Matthews acting as an attorney had a duty to make certain representations, nonetheless, Matthews [by signing "under duress"] was attempting to simultaneously say that the representations on the form both are not his representations and that they are his representations. RP 02-12-10, p. 21, ln. 3-18. The court then concluded that at a later date it would need to revisit Matthews continuing to represent himself if he would not take action as counsel. RP 02-12-10, p. 21, ln. 25 to p. 22, ln. 4.

On April 16, 2010, a hearing was scheduled either for Matthews to enter into a plea, or in the alternative for the court to conduct a status conference. RP 04-16-10, p. 3, ln. 20-22. Matthews apparently decided he would not enter a plea so it was to be a status conference. RP 04-16-10, p. 3, ln. 22-24.

At the beginning of the hearing when the court addressed him as "Mr. Matthews," the defendant stated that "...I have yet to identify myself as Mr. Matthews, merely stating that I am here with regard to this matter.

RP 04-16-10, p. 4, ln. 12-13. This happened despite the fact that throughout the January and February proceedings the court repeatedly referred to him as "Mr. Matthews" without any such response having been made. The court then asked him if he was Mr. Matthews, to which he responded by asking the court if it was speaking to him, and then telling the court that if it would like to know what to call him, he was the "presiding Neo Ordo Ab Anunnaki" and stated that the name Brian Matthews does not belong to him.[5] RP 04-16-10, p. 4, ln. 11-21.

The court then asked, "So if we're trying Mr. Matthews for this offense and Mr. Matthews is representing himself, that would not be you?" RP 04-16-10, p. 4, ln. 22-24. Matthews responded that he was not subject to the jurisdiction or authority of the court, that he was a sovereign state, a sovereign international nation, and was present "...with regard to this matter as a representative as it applies to the discharge and facilitating the business of Mr. Brian David Matthews." "I am presiding of the Neo

---

[5] Despite a grammatically awkward admixture of Greek and Latin, the phrase could be translated as "A New Order Of/From The Anunnaki." The Anunnaki are a group of Sumerian deities. *See* http://www.newworldencyclopedia.org/entry/An_(mythology) http://faculty.gvsu.edu/websterm/SumerianMyth.htmhttp://en.wikipedia.org/wiki/Anunnaki

A Washington Corporation named Neo Ordo Ab Anunnaki is listed as active since 2007 on the Corporations Division business name search of the Washington Secretary of State's web site. The president is listed as "David, Brian." *See* http://www.sos.wa.gov/corps/search_detail.aspx?ubi=602708143 Presumably this is the business Matthews attempted to have post bail on his behalf.

Ordo Ab Anunnaki, and we have already provided, I do believe, to this court certified documents by way of state seal underneath the Department of...the director of the Department of licensing, Elizabeth Luce, showing commercial registration and international registration as it applies to nationality." RP 04-16-10, p. 5, ln. 4-20.

When the court said he needed to answer one of the court's questions because the court was not understanding this and asked who he was representing. RP 04-16-10, p. 5, ln. 21-23. Matthews then responded that he ..."conditionally accepted the court's offer to have him answer questions upon valid proof of claim." RP 04-16-10, p. "I have represented to the state of Washington...a written request for validation and/or verification of debt..." The colloquy continues similarly, with the defendant stating, "I conditionally accept the Court's offer to have me answer these questions." RP 04-16-10, p. 6, ln. 6-18. The court responded, "[y]ou're not conditionally answering anything." RP 04-16-10, p. 6, ln. 19-20. "Either you answer my question or you don't." RP 04-

16-10, p. 6, ln. 19-20. The colloquy continues similarly for some time.[6]

The court inquired of standby counsel about whether in his interactions Matthews appeared mentally competent to represent himself. RP 04-16-10, p. 10, ln. 7-9. Counsel responded that while Matthews appeared intelligent and capable, he did not believe Matthews competent to act as his own attorney based on serious concerns about Matthews' mental status. RP 04-16-10, p. 10, ln. 10-25. However, standby counsel also noted that Matthews had been to Western State Hospital on several occasions and been found competent to proceed, and that he did not believe Matthews' status had changed in any way since those findings were made. RP 04-16-10, p. 11, ln. 3 to p. 12, ln. 5. As a result, the court set a special hearing on April 22, 2010, to address the matter [of

---

[6] This type of response and colloquy is typical of individuals who often refer to themselves or are referred to by others as "constitutionalist." They assert that they are not subject to the jurisdiction of the courts because they are sovereign citizens and/or nations and are only bound to the extent that they agree to be bound, either by entering into a contract, or by acknowledging the court and its processes resulting in a default acquiescence. Some such constitutionalists believe they can avoid the default by incorporating a business and appearing as a representative of the business acting on behalf of the sovereign individual who is charged with a crime. In doing so they typically refuse to acknowledge the real person they are, again because they view doing so as an acquiescence to the court's jurisdiction. Many such "constitutionalists" view the courts as not lawfully constituted under the United States or Washington Constitutions and as a reflection of that may refer the state or county as The State of Washington or the County of Pierce, rather than Washington State or Pierce County. Such a reference attempts to distinguish between unconstitutional governmental entities (the former) and the true constitutional entities (the latter). *See*

http://en.wikipedia.org/wiki/Sovereign_citizen_movement
http://www.fbi.gov/news/stories/2010/april/sovereigncitizens_041310
http://www.cbsnews.com/stories/2011/05/15/60minutes/main20062666.shtml

Matthew's competence to represent himself]. RP 04-16-10, p. 15, ln. 19-25.

On April 22, 2010, the court held the hearing to consider whether Matthews was still competent to represent himself. RP 04-22-10, p. 4, ln. 8-20. The State noted that it had attempted to meet with Matthews that morning to discuss the status of the case and that Matthews was unresponsive and would not engage or acknowledge either the prosecutor or standby counsel. RP 04-22-10, p. 5, ln. 1-9. The jail staff indicated that Matthews only started behaving like that and he stopped interacting with anyone as the officers brought him to court. RP 04-22-10, p. 5, ln. 10-14.

However, Matthews did respond to the court, which proceeded to go through the colloquy with him anew regarding self-representation. RP 04-22-10, p. 8, ln. 3-14. Initially when asked if he still wanted to represent himself Matthews said, "[y]es." RP 04-22-10, p. 8, ln. 9-11. The court then inquired about Matthews training and experience in the law. RP 04-22-10, p. 8,ln. 12-14. Matthews explained to the court his many filings in the superior court, that he is self-taught having spent a considerable amount of time in numerous state penal institutions' law libraries, and that he had gone through a trial before as his own attorney. RP 04-22-10, p. 9, ln. 1-4. Matthews' standby counsel explained to the

court that Matthews prevailed on an earlier PRP and was resentenced as a result and that he represented himself well and ably in each of those proceedings. RP 04-22-10, p. 10, ln. 9-16.

The court explained that Matthews would be required to follow all of the rules and procedures that any lawyer would have to follow in the courtroom and Matthews indicated that he understood that. RP 04-22-10, p. 11, ln. 23 to p. 12, ln. 1. Matthews stated that he understood he would have to select a jury, formulate questions for witnesses and formulate objections to questions that the state may ask. RP 04-22-10, p. 12, ln. 2-9. Matthews also stated that he believed that he could handle any necessary legal research adequately. RP 04-22-10, p. 12, ln. 10-15. Matthews then told the court that he would like to proceed all alone and without standby counsel. RP 04-22-10, p. 12, ln. 16 to p. 13, ln. 2.

Based on Matthew's conduct at an earlier hearing, the court then had a particular concern about Matthews' conduct at an earlier trial wherein Matthews adopted what the court described as a constitutionalist pose. RP 04-22-10, p. 13, ln. 3-15. At that time Matthews did not respond to any of the court's allegations except on condition that the court did something to acknowledge some other document that he had sent previously and in which he had claimed they were all in violation of

something involving the Federal Trade Commission. RP 04-22-10, p. 13, ln. 9-15.

The court noted that if Matthews behaved that way in the middle of a trial he would not be in a position to object to questions, examine witnesses, and so on. RP 04-22-10, p. 13, ln. 15-18. Notably, Matthews assured the court that course of conduct would not happen during the trial. RP 04-22-10, p. 13, ln. 19-21. The court noted that on the first occasion when he saw the defendant, Matthews just said he didn't know with regard to any kind of question that the court asked of him. RP 04-22-10, p. 13, ln. 22 to p. 14, ln. 3. The defendant's response to that was to claim that, as he had explained previously, "I haven't been feeling like myself at times". RP 04-22-10, p. 14, ln. 4-5.

The court then continued that if he were to do that again in the course of trial that he might not be able to defend himself [adequately]. RP 04-22-10, p. 14, ln. 6-9. The court went on, "If you get to a state where you are not responding for either, you know, some kind of legal basis, I suppose, which is a constitutionalist approach, or you are simply saying, I don't know, and you can't make a decision, that becomes difficult because you have to make decisions frequently in the middle of trial." RP 04-22-10, p. 14, ln. 13-19. "In some sense you may have to make a decision after almost every question, is it objectionable, is it not."

RP 04-22-10, p. 14, ln. 19-22. The defendant responded that he believed that he was adequately prepared to face whatever it is that we are going to face during this process. RP 04-22-10, p. 14, ln. 22-24.

The court went on to note that there were times where Matthews' conduct was such that if he had been in trial, he would not have been able to represent himself in an adequate way by that conduct. RP 04-22-10, p. 14, ln. 25 to p. 15, ln. 6.

The defendant's response was particularly telling.

> I apologize to the court for any inappropriate behavior and I do give thanks for giving me the leadway [sic] that you have given me thus far. I do not mean any disrespect or dishonest to the Court or to the State or to standby counsel. At the time, I believed that I was doing what I need to do in order to make my record. Nothing more; nothing less. I understand -- I understand all of what you are saying, Judge. Again, I will assert to the court that course of conduct will not happen during the trial.

RP 04-22-10, p. 15, ln. 7-17 (emphasis added). The court continued that it did not doubt Matthew's sincerity, but that it was unsure whether he could accomplish it. RP 04-22-10, p. 15, ln. 18-21. Matthews responded:

> Judge, I'll refer to the Court that I have represented myself in a previous trial all of the way from judgment. I have been given kudos by Mr. McCann [the prosecutor] himself that I have done a very adequate job.

RP 04-22-10, p. 15, ln. 22 to p. 16, ln. 1.

The court then proceeded to discuss the difficulty of Matthews calling himself as a witness in the case and conducting examination. RP 04-22-10, p. 16, ln. 2-4. Matthews said that issue had been confronted in the previous trial and detailed two separate procedures for conducting such examination. RP 04-22-10, p. 16, ln. 5-6. One was to have Matthews write out his questions to himself and have standby counsel read the questions. RP 04-22-10, p. 16, ln. 6-9. The alternative was to have Matthews ask himself questions by first stating "Question," and then answer by saying "Answer" so that the court reporter would be able to properly transcribe the questioning. RP 04-22-10, p. 16, ln. 9-17. The court asked Matthews:

> THE COURT: Are you willing to proceed in that same fashion on this case?
> THE DEFENDANT: If I take the stand, yes, I would be willing to do that.
> THE COURT: Are you prepared to do that.
> THE DEFENDANT: Yes, I am prepared to do that.

RP 04-22-10, p. 18-23.

The court then said, that if the Mr. Matthews at trial is the same Mr. Matthews before the court during this colloquy, then the court did not foresee any problems with Matthews representing himself, but that he wasn't sure that was the person who would show up because there had

been a great deal of erratic behavior by Matthews. RP 04-22-10, p. 16, ln. 24 to p. 17, ln. 7.

Matthews then responded, "I do believe that the Matthews that is presenting himself to you today will be the one that continues to show up and address this. RP 04-22-10, p. 17, ln. 8-10. In response to an inquiry by the court about the reference to different or multiple Mr. Matthews, the defendant explained that he was only mirroring the court's own usage. RP 04-22-10, p. 17, ln. 15-19. Matthews then asserted:

> I do believe that I understand what is going on. I do believe that I understand the court process and procedures of this trial, win, loose, or draw.

RP 04-22-10, p. 17, ln. 19-22. The court then allowed Matthews to continue to represent himself, but would keep standby counsel on the case. RP 04-22-10, p. 17, ln. 23 to p. 18, ln. 6. The court explained that standby counsel would step in to represent Matthews and complete the trial if Matthews became ineffective and that the court was not going to declare a mistrial on that basis. RP 04-22-10, p. 18, ln. 1-9. Because the court was going to appoint standby counsel anyway, Matthews indicated that he intended to confer and make use of him. RP 04-22-10, p. 19, ln. 9-18.

As indicated above, in the first step of the two-step test the court must determine whether the defendant's request to proceed *pro se* is both unequivocal and timely. Matthews cites to scattered occurrences on

various hearing dates to support his claim that he was not competent to conduct his own trial. However, he does not cite to April 22, 2010, the date the court conducted the colloquy to determine whether or not he could proceed *pro se*, which is the record that is primarily determinative on this issue. *See* Br. App. 33-36.

His citation to instances of his claimed incompetence that occurred during the trial itself are limited to July 1, 2010, and July 6, 2010. Br. App. 35. Most tellingly, every instance he cites occurred outside the presence of the jury and in and of itself had no effect on the conduct of the trial.

Thus, Matthews claimed that he believed that he was in a year prior to 2010, that he didn't believe the proceedings were real and that it was all a figment of his imagination, and a show. RP 07-01-10, p. 203, ln. 11 to p. 205, ln. 10. This happened after Matthews attempted to exclude the testimony of Tracy Sears, apparently on the basis of privilege by claiming she was his wife and by also renewing his claim that he was sovereign and not subject to the court's jurisdiction and by asserting contractual rights and contractual privilege. RP 07-01-10, p. 197, ln. 1 to p. 201, ln. 24. However, the court noted the defendant appeared to be posing because he was unhappy with the way things were going. RP 07-01-10, p. 206, ln. 1-3.

In response to the court's comment, Matthews said that what he had stated were his sincere beliefs and when asked if he was going to continue to represent himself, Matthews said, "[i]f you force me to..." RP 07-01-10, p. 206, ln. 7-9. The court then explained that it wasn't forcing him to do anything other than have trial proceed. RP 07-01-10, p. 206, ln. 10-23. The court reminded Matthews that he said that he would no longer make claims about the court's jurisdiction, about his status as a free and independent entity, etc. and that he would be willing to go forward. RP 07-01-10, p. 19-23. Matthews claimed he did not remember any of that. RP 07-01-10, p. 206, ln. 24. Before starting, Matthews then moved to dismiss the case for lack of jurisdiction, which the court denied. RP 07-01-10, p. 207, ln. 2-5. After this, the court resumed proceedings in front of the jury. RP 07-01-10, p. 207, ln. 6-23.

Matthews also attempts to rely upon statements he made on July 6, 2010, that he thought Bill Clinton was president. Br. App. 35 (citing RP 07-06-10, p. 384, ln. 5-6.). This occurred at the beginning of trial that day, outside the presence of the jury after the defendant attempted that because the court had rejected his argument that Tracy Sears was his wife, there was a contractual relationship between them that also applied to A.E. who he referred to as commercially registered private property [presumably meaning that A.E. could not testify contrary to his objections]. RP 07-06-

11, p. 380, ln. 6 to p. 385, ln. 20. *See also* RP 07-01-10, p. 200, ln. 10 to p. 202, ln. 15. It is worth noting that the instances the defendant relies upon to support his claimed lack of competence occurred outside the presence of the jury and affected the trial in no way. So the only relevance they possibly have is as evidence of Matthews' competence to represent himself.

Moreover, the court found that Matthews intentionally attempted to manipulate the process. The court noted at the beginning of the sentencing hearing, "[w]ell, I do find that this is just a pose by Mr. Matthews. There is no question that he is competent. There is no question that he is lying right now and knows that he is lying. I'm not going to replace him has counsel..." RP 08-13-10, p. 842, ln. 12-17.

Before imposing sentence, the court went on to state, "I think the record needs to be clear that Mr. Matthews has, to an extent that is extraordinary in my personal experience as a lawyer and a judge, attempted to affect various poses during the course of this case, claiming sometimes not to be able to respond, not knowing what to do, and so on." RP 08-13-10, p. 853, ln. 10-15.

Going through the two-step test establishes that the court properly allowed Matthews to exercise his right to represent himself.

The defendant's assertion of his desire to proceed *pro se* was in fact extremely clear and unequivocal. RP 04-22-10, p. 8, ln. 3 to p. 18, ln. 9. Nor did Matthews at any subsequent time indicate that he did not want to continue to represent himself.

Timeliness is not an issue under the facts of this case, as the defendant raised the issue at his first appearance in the trial court and the motion was heard on April 22nd, 2010, well before the start of trial on June 28, 2010. RP 04-22-10, p. RP 04-22-10, p. 17, ln. 23-24; RP 06-29-10; CP 248-49.

Because the defendant's assertion of his right to represent himself was unequivocal and timely, the court then proceeds to the second step of the analysis, and inquires whether the defendant's waiver of the right to counsel was voluntary, knowing, and intelligent. Here, the record amply attests that it was.

In its colloquy with Matthews, the court carefully addressed the defendant's lack of formal training and the specialized legal skills involved in trial. RP 04-22-10, p. 8, ln. 15 to p. 9, ln. 4; p. 10, ln. 8-18; p. 11, ln. 23 to p. 12, ln. 15. To all of this the defendant responded by indicating that he understood what the court was telling him and that he felt he could handle it adequately. Accordingly, the colloquy

demonstrates that the defendant's choice to waive his right to counsel was voluntary, knowing and intelligent.

The defendant's claim is based primarily on statements that occurred prior to the April 22nd hearing. The few that occurred after did occur during trial, on July 1 and July 6, but occurred outside the presence of the jury. The defendant never indicated that he did not want to continue to represent himself. And during the course of trial, in front of the jury Matthews was relatively effective, clearly understanding complex issues and able to argue them in an appropriate manner. *See*, RP 07-01-10, p. 266, ln. 3-9. *See generally, e.g.*, RP 07-01-10, p. 264, ln. 20 to p. 268, ln. 18; p. 279, ln. 4 to p. 282, ln. 11. The defendant was also adequately competent in his cross examination of Dr. Heimbach, even if the Dr. didn't ultimately say what Matthews wanted as to whether the burns could have been caused by the tea maker. RP 07-07-10, p. 606ff.

Moreover, in assessing whether the defendant's waiver was voluntary, intelligent and knowing, the court repeatedly noted that it believed he was intentionally posturing [to create error]. *See* RP 07-01-10, p. 206, ln. 1-3; p. 278, ln. 25 to p. 279, ln. 3; RP 07-09-10, p. 12-17.

There was other significant evidence of the defendant's attempts at manipulation. The defendant acknowledged that he set up a company and had it submit bond to the jail in an attempt to get them to release him. RP

01-29-10, p. 18, ln. 2-16; 02-12-10, p. 14, ln. 7-18. Matthews married or attempted to marry Tracy Sears over the phone in jail, and then claimed or elicited that they actually were or were not married as it suited him at the moment. *See* RP 01-29-10, p. 18, ln. 17-19; RP 07-01-10, p. 197, ln. 11 to p. 204, ln. 12; p. 337, ln. 23 to p. 338, ln. 21. While on bail he had contact with Sears in violation of his conditions of release, which he in part attempted to excuse on the basis that he was married to her. RP 01-29-10, p. 18, ln. 20-25; RP 02-12-10, p. 27, ln. 13-17. She told the prosecutor that Matthews had been calling her from jail asking to change her story regarding her observations and declarations that she saw Matthews using drugs while he was out [on bail]. Thus, Tracy Sears indicated during trial testimony that she thought she was married to Matthews in 2008, but later concluded that she was not. *See* RP 07-01-10, p. 270, ln. 7 to p. 276, ln. 5.

Indeed, Matthews' attempts to manipulate the record continued even after trial. Matthews modified the judgment and sentence in paragraph 3.2 by marking the box and writing in that the court dismissed count I. CP 148. He then sought release by the Department of Corrections claiming his judgment and sentence was invalid based on the fact that count I had been dismissed. *See* RP 10-08-10, p. 2ff. As a result,

the court had to enter a new corrected Judgment and Sentence. RP 10-08-10, p. 2ff; CP 156-162.[7]

As the court noted in ***Fields v. Murray***, "[a] skillful defendant could manipulate this dilemma [right to counsel v. desire to proceed *pro se*] to create reversible error." ***Fields v. Murray***, 49 F.3d 1024 (4th Cir. 1995). That is precisely what the defendant has attempted in this case. Here, the court's repeated determinations that the defendant was posturing and/or seeking to manipulate the record are also entitled to deference. And the total record should be interpreted in light of these statements by the court.

Not only does Matthews fail to establish that the court erred in allowing him to represent himself, he has also failed to claim any prejudice resulting from any such error. If he can show no prejudice, even if there were error, it was harmless and Matthews is not entitled to relief. As the court said during sentencing, "[d]uring the course of trial he did a good job, I think, a pretty effective representative. RP 07-09-10, p. 854, ln. 6-8.

---

[7] Additionally, volume I of the superior court Clerks file contains a notation, "*File to be viewed at counter. Plea document filed 6-7-99 was altered." That document has had VOID written across the front in red pen.

D. CONCLUSION.

The court never lost jurisdiction over the defendant or the case because the Court of Appeals did not dismiss the charge, but rather only allowed the defendant to withdraw his plea so that the case merely returned to the status it had before he entered his plea.

The filing of the Third Amended Information was proper where it was filed prior to opening statements, the defendant was rearraigned, the court entered a plea of not guilty on his behalf where he refused to respond, and the information only removed some allegations and corrected statutory references.

Sufficient evidence established Matthews guilt for Assault of a Child in the First Degree as to the intent element under either alternative means.

The court properly applied the aggravators where they were found by a jury and the jury's findings were supported by sufficient evidence.

The exceptional sentence was appropriate because it was not clearly excessive nor an abuse of discretion. The court, having applied the aggravators found by the jury, was entitled to consider the totality of the evidence before it when deciding the specific amount of time to impose.

The court properly allowed Matthews to proceed pro se where his request was unequivocal and timely, and was also voluntary, knowing and

intelligent. Matthews' attempts to manufacture error and manipulate the record by posing as if he was not competent was recognized by the trial court for what it was and should be rejected by this Court as well.

Matthews' claims should be denied and the conviction and sentence should be affirmed.

DATED: September 28, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-28-11 Date

Signature

PIERCE COUNTY PROSECUTOR

September 28, 2011 - 10:07 AM

Transmittal Letter

Document Uploaded: 411890-Respondent's Brief.pdf

Case Name: State v. Matthews

Court of Appeals Case Number: 41189-0

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us